IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)

FILED
FEB 23 2001
U.S. BANKRUPTCY COURT
DISTRICT OF MARYLAND
BALTIMORE
DROP BOX

In re:	*	
FRANK'S NURSERY & CRAFTS, INC., et al.,	*	Case Nos. 01-52415-JS through 01-52416-JS
	*	(Chapter 11)
Debtors.	*	(Jointly Administered)

* * * * * * * * * * * * * *

DEBTORS' EXPEDITED MOTION FOR ORDER: (A) AUTHORIZING PAYMENTS OF CERTAIN PREPETITION OBLIGATIONS RELATED TO GOODS IN TRANSIT; (B) CONFIRMING GRANT OF ADMINISTRATIVE EXPENSE STATUS TO DEBTORS' UNDISPUTED OBLIGATIONS FOR GOODS ORDERED PREPETITION AND DELIVERED POSTPETITION AND AUTHORIZATION FOR DEBTORS TO PAY SUCH OBLIGATIONS IN THE ORDINARY COURSE OF BUSINESS; (C) AUTHORIZING TREATMENT OF RETURN TO VENDOR GOODS; AND (D) GRANTING RELATED RELIEF

Frank's Nursery & Crafts, Inc. ("Frank's") and FNC Holdings, Inc. ("FNC"), debtors and debtors-in-possession (collectively, the "Debtors") in the above-captioned cases, by their undersigned counsel, file this expedited motion for an order (a) authorizing limited payments related to goods in transit; (b) confirming grant of administrative expense status to Debtors' undisputed obligations for goods ordered prepetition and delivered postpetition and authorization for Debtors to pay such obligations in the ordinary course of business; (c) authorizing treatment of return to vendor goods; and (d) granting related relief (the "Motion"), and in support thereof respectfully state:

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Jurisdiction

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicate for the relief sought herein is sections 105(a), 361, 363, 503(b) of the title 11 of the United States Code (the "Bankruptcy Code").

The Chapter 11 Cases

3. On February 19, 2001 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in this Court. The Debtors continue in possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Debtors' chapter 11 cases have been consolidated for procedural purposes only.

4. On or about February 19, 2001, the Unites States Trustee for the District of Maryland (Baltimore Division) (the "US Trustee") appointed a provisional official committee of unsecured creditors (as the same may be reconstituted, the "Committee") in these chapter 11 cases.

The Debtors and Their Business Operations

5. Frank's, founded in 1949, operates the largest United States chain (as measured by sales) of specialty retail stores devoted to the sales of lawn and garden products. Lawn and garden products include green and flowering plants for outdoor and indoor usage, live

landscape products such as trees and shrubs, fertilizers, seeds, bulbs, gardening tools and accessories, planters, watering equipment, garden statuary and furniture, wild bird food and feeders, mulches and specialty soils. Frank's also is a leading retailer of Christmas Trim-A-Tree merchandise, artificial flowers and arrangements, garden and floral crafts, and home decorative products. FNC (formerly known as General Host Corporation) is the sole shareholder of Frank's.

6. As of February 9, 2001, Frank's operated 217 retail stores in 15 states, primarily in the Mid-Atlantic, Midwest and Northeast. At that time, an additional 44 stores were being closed as part of a previously announced plan to sell under-performing store locations. In its fiscal year ending January 28, 2001, Frank's had sales of approximately $435 million. Currently, the Debtors employ approximately 1,900 full-time and 5,000 part-time employees. As of November 5, 2000, the Debtors had total assets of approximately $471.9 million and total debt of approximately $338 million.

7. The Debtors' sales are seasonal. The lawn and garden revenues are concentrated principally in the Spring and, to a lesser extent, in the Fall. The Trim-A-Tree sales occur between Thanksgiving and Christmas.

8. During most of the first half of 2000, weather patterns negatively impacted lawn and garden product sales across the Debtors' principal markets. During the third quarter of 2000, the Debtors decided to close 44 under-performing stores, liquidate their inventories, and sell the closed stores owned by the Debtors. Later in 2000 it became apparent that the Debtors' Trim-A-Tree holiday season sales were below expectations, which was consistent with the general softness in sales at retailers during this period.

9. In 2001, notwithstanding excess borrowing availability under their existing bank credit facilities, the Debtors were unable to draw down sufficient funding to meet the Debtors' working capital needs because the Prepetition Lenders asserted that various conditions to borrowing had not been met. (The Prepetition Lenders, however, did provide limited funding subject to various conditions). Also, in the relatively short period since access to their credit facilities had been curtailed, the Debtors were unable to secure additional funding to meet those working capital needs. Ultimately, the Debtors determined the most appropriate method to obtain such financing and achieve their restructuring objectives was through chapter 11 filings.

Relief Requested

10. By this Motion, the Debtors request: (a) authority, subject to the exercise of their business judgment, to pay certain prepetition obligations, necessary to obtain the release of goods in transit, related to transportation, storage, warehousing, packaging, oversight, inspection and related services as well as to tariffs, customs, duties, excise taxes and similar charges (collectively, the "Goods in Transit Obligations"); (b) confirmation of administrative expense status for and the Debtors' authority to pay in the ordinary course of business undisputed obligations to vendors for goods ordered prepetition and delivered to the Debtors postpetition (the "Prepetition Purchase Order Obligations"); and (c) authority respecting treatment of certain excess inventory that may be returned to vendors (the "RTV Goods"). Each of these requests is vital to the Debtors' ongoing efforts to stock up promptly on inventory in advance of the Debtors' primary sales season, the Spring.

AUTHORITY FOR THE RELIEF REQUESTED

11. Section 105 of the Bankruptcy Code provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Moreover, it is well settled that a bankruptcy court may authorize the payment of prepetition obligations where necessary to facilitate the chapter 11 process. In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) ("[T]o justify a payment of a prepetition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the chapter 11 process."). Under the "necessity of payment doctrine," courts have recognized that the payment of certain prepetition obligations of a debtor is permissible when such payments are necessary to preserve the business of the debtor and the failure to pay prepetition obligations posed a real and significant threat to a debtor's reorganization. See, e.g., Miltenberger v. Logansport Railway, 106 U.S. 286 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent "stoppage of . . . [crucial] business relations"); In re Lehigh & New Eng. Ry., 657 F.2d 570 (3d Cir. 1981) (payment of claims of creditors authorized under "necessity of payment" doctrine); Dudley v. Mealy, 147 F.2d 268 (2d Cir.), cert. denied, 325 U.S. 873 (1945); In re Environdyne Indus., 150 B.R. 1008 (Bankr. N.D. Ill. 1993); In re Financial News Network, Inc., 134 B.R. 732 (Bankr. S.D.N.Y. 1991).

12. The lifeblood of a retailer such as Frank's is the flow of inventory into stores so it will be available to customers. Since the Petition Date, Frank's has positioned itself to fully stock up on inventory by obtaining a $100 million DIP financing facility and continuing ongoing operations.

13. Nonetheless, equally important with such accomplishments is the speed within which Frank's can obtain inventory because its primary season, the Spring, is close at hand. In that regard, three potential obstacles have arisen. First, certain goods in transit to Frank's are now being held in warehouses or other locations pending payment of storage costs, customs duties or similar charges related to transit. Second, before shipping, certain vendors holding as yet unfilled prepetition purchase orders from Frank's have requested a comfort order that Frank's' obligations for goods delivered postpetition based on such orders will have administrative expense status. Third, before shipping, certain vendors who customarily accept returns of unsold goods and then credit the purchase price of such goods against outstanding receivables seek clarification on how postpetition returns of goods received prepetition will be treated.

A. Goods in Transit Obligations

14. The only situation involving Goods in Transit Obligations of which the Debtors are now aware is that immediately after the Petition Date, the Debtors were notified by Danzas AEI Intercontinental, the Debtors' freight agent, that certain imported goods with a retail value of over $6 million were not being released due to outstanding amounts owed for customs, warehousing and related costs. The Debtors estimate that such outstanding amounts aggregate approximately $162,000, of which approximately $80,000 relates to the prepetition period.[1]

15. Although the Debtors currently are unaware of similar situations, there may be other goods that are in transit overseas or within the United States or held by shippers, forwarders, common carriers or warehousemen for which title passed to the Debtors prepetition

but, nevertheless, the Debtors do not yet have physical possession. Accordingly, to obtain physical possession promptly, the Debtors may need to pay incidental prepetition expenses, including, without limitation, rail freight, trucking charges, common carrier charges, import charges, warehouse charges, consolidation and pooling charges and similar obligations. The Debtors, therefore, seek authority to exercise their business judgment to pay such obligations upon written consent from the Committee and Wells Fargo Retail Finance, Inc. (the "Agent"), agent to the lenders under the Debtors' debtor in possession financing facility (the "DIP Facility").

16. Beyond the Debtors' immediate need for the goods, there are other justifications for granting such authorization. Typically, entities such as carriers, warehousemen, mechanics, artisans, materialmen and repairmen may seek to assert possessory liens on goods in their possession to secure payment for such charges and related expenses. See Md. U.C.C. § 7-307(1) ("A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law . . . .") See also N.Y. U.C.C. § 7-307(1); Md. U.C.C. § 7-209 (lien of warehouseman); N.Y. U.C.C. § 7-209. Additionally, the United States Customs Service may seek to assert a lien against imported goods pursuant to 19 C.F.R. 141.1 (1994) or a priority claim status pursuant to section 507(a)(8)(F) of the Bankruptcy Code.[2]

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[1] By this Motion, the Debtors are not seeking to pay any prepetition amounts that may be owed to the vendor of the merchandise.

[2] Even in those situations where the party holding the Debtors' merchandise may lack a valid security interest in or priority claim for the goods held, cause exists for permitting payment now. First, time is of the

17. Accordingly, there are ample grounds for authorizing the Debtors to pay Goods in Transit Obligations.

B. Prepetition Purchase Order Obligations

18. As of the Petition Date, in the ordinary course of their business the Debtors had numerous purchase orders outstanding for goods as yet undelivered. Since the Petition Date, the Debtors have found that certain vendors are concerned that delivery of goods postpetition based on prepetition purchase orders may not entitle the claims of such vendors to administrative expense priority. In order to alleviate such concerns (however unfounded), and thereby encourage such vendors to ship without the expense and delay of the Debtors having to issue new purchase orders, the Debtors seek an order: (a) granting an administrative expense priority under section 503(b) of the Bankruptcy Code to undisputed vendor claims arising from prepetition purchase orders for goods delivered postpetition; and (b) authorizing the Debtors to satisfy such undisputed obligations in the ordinary course of business under section 363(c) of the Bankruptcy Code.

19. Pursuant to section 503(b)(1)(A) of the Bankruptcy Code, obligations that arise in connection with the postpetition delivery and acceptance of goods, including goods ordered prepetition, are administrative expenses of the Debtors' estates. Thus, granting the relief sought regarding Prepetition Purchase Order Obligaitons would not provide vendors with any greater priority than they otherwise would have.

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essence. Second, the Debtors' legal costs to obtain possession of the goods could exceed the obligations proposed to be paid. Third, the cooperation of the shippers and other parties at issue will be important to the Debtors' ongoing operations.

20. Absent such relief, however, the Debtors may be required to expend substantial time and effort to issue new postpetition purchase orders. As a result, the relevant vendor would obtain the same postpetition administrative claim, but only after the Debtors' business suffered disruption. Accordingly, the Debtors request authorization to honor prepetition purchase orders, in the exercise of their business judgment, if the Debtors have confirmed the purchase order after the Petition Date or the goods are received postpetition under the terms agreed to by the Debtors.

C. Return To Vendor Goods

21. Additionally, in the ordinary course of the Debtors' business, the Debtors have entered into certain purchase agreements that enable the Debtors to return RTV Goods (i.e., excess inventory) to the applicable vendors at the end of a season in exchange for a credit against the Debtors' purchase obligation. Before making further shipments, certain of the applicable vendors have requested assurances that credits for RTV Goods delivered prepetition will be applied against prepetition amounts owed by the Debtors to the applicable vendor. Such vendors are concerned that otherwise the Debtors will seek to credit any RTV Goods against the Debtors' postpetition obligations to the vendors.

22. After reviewing the relevant RTV Goods programs and the related historical and projected purchases, the Debtors expect that substantially all of the RTV Goods at the end of the current season will relate to prepetition purchases of poorly selling items. That is because generally only the hottest (i.e., best selling) goods will continue to be ordered postpetition as the Spring season is very close. The Debtors estimate that the aggregate amount of prepetition RTV Goods will approximate $600,000.

23. Accordingly, the Debtors seek authority to negotiate agreements with RTV Goods vendors regarding the appropriate credit for RTV Goods on terms that fairly reflect the point at which the relevant RTV Goods were delivered to the Debtors. The Debtors will consult with the Committee on any such agreements.

Reservation of Rights

24. Nothing contained herein should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim or an approval or assumption of any agreement, contract or lease. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order will not be intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

25. No previous motion for the relief sought herein has been made to this or any other court.

26. The Debtors are seeking and hope to obtain the consent of the Committee and the Agent to the relief requested herein.

Conclusion

WHEREFORE, the Debtors respectfully request entry of the annexed order granting the relief requested herein and granting such other and further relief as may be just and proper.

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of February, 2001, a copy of the foregoing pleading was sent via overnight mail, where available, to the parties listed on the attached Service List. The pleading as served upon the parties excluded a copy of the attached Service List in order to expedite copying and transmittal. Any party desiring a copy of the pleading with the Service List attached may contact the undersigned counsel or may review the original pleading at the Clerk's Office.

Martin T. Fletcher

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DISTRICT OF MARYLAND
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